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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [illegible]

No. [illegible] 31

BENJAMIN W. COREY, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 3, 1962

CERTIORARI GRANTED JANUARY 21, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 569

BENJAMIN W. COREY, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Crim. 61-67-F

FORD, D.J.

UNITED STATES OF AMERICA,

v.

BENJAMIN W. COREY.

Court Room No. Three
Federal Building, Boston

TRANSCRIPT OF SENTENCING PROCEEDINGS OF MARCH 26, 1962

The Clerk: No. 61-67-F Criminal, United States against Benjamin W. Corey.

Mr. Gibson: Your Honor, in this case we don't have any recommendation because of the—according to the notation that the probation report was incomplete.

Mr. St. Clair: If your Honor please, I have here a clinical record from the Veterans Administration Hospital by Dr. Banan. I have Dr. Banan here under subpoena.

The Court: What is the date of that report you have?

Mr. St. Clair: I have a date of 12-1-61.

The Court: I have that. I read that, too. Yes, I did; I read this.

Mr. St. Clair: I have, as I say, Dr. Banan here and [fol. 2] would like to have him, your Honor, tell you first-hand about this case.

The Court: Put him on if you would like to.

STATEMENT OF COUNSEL FOR DEFENDANT

Mr. St. Clair: I would like to, but first I would like to give a little bit of the background of this individual, as I understand it, from what he has told me.

This man was born in Cambridge, Massachusetts of immigrant parents. He attended the public schools in Cambridge and at an early age started to work to support himself and put himself through school and assist his brothers. He has two brothers, both of whom are medical doctors, one in Florida and one here in Massachusetts.

This man attended Harvard College on scholarships and graduated from Harvard College with honors in 1941. During that time he worked in the—under Civil Service appointment in the Post Office and elsewhere.

And in 1941 he went into the service and had, from what he tells me, quite a remarkable military record, having served as a counterintelligence agent in the South Pacific, in Australia, and later was parachuted behind the lines in France as an intelligence agent during the Second World War.

Following his release from active duty, all of which was honorable, as far as I can ascertain, he returned to Cambridge and attended the Harvard Law School and graduated in 1947—in fact was a classmate of mine at that time.

[fol. 3] He rose to the temporary rank of lieutenant colonel in the Army of the United States and had a rank of—permanent rank, I believe, in the Reserves as a captain.

Following his law school career he worked in a patent law firm in Boston and New York for a short time. He then returned to the Harvard Business School for a year and then he went to work in the motion picture-TV field.

With the Korean War he returned, apparently, to active duty and was called by the Pentagon to serve in the capacity as a research and development coordinator.

Following the Korean War he had an unfortunate personal experience and apparently underwent a rather traumatic change. I am not a psychiatrist nor a psychologist, but from that point on he reverted to rather menial labor. He started in repairing radios by hand and eventually got good enough at it so that he owned his own business, which led to the difficulties he is now in.

I think that the doctor might be able to shed some light at least on one aspect of the problem facing your Honor at this time. That is as to what effect a sentence would

have as far as rehabilitation is concerned, and I would like to call Dr. Banan, if I may. Would you call to the stand Dr. Banan?

[fol. 4] DAVID M. BANAN, sworn.

Direct examination.

By Mr. St. Clair:

Q. Would you state your full name, please?

A. David M. Banan.

Q. Are you a medical doctor?

A. I am.

Q. Are you affiliated with the Veterans Administration?

A. I am.

Q. What affiliation do you have there?

A. I am chief of the admissions service.

Q. In the practice of medicine have you specialized at all, Doctor?

A. I have specialized in psychiatry and am a diplomate of the American Board of Psychiatry.

Q. How long have you been a diplomate?

A. Since 1951.

Q. And would you give his Honor a brief synopsis of your background and education, and particularly your professional education?

A. I was graduated from the University of Illinois School of Medicine in 1930. I served an internship at Cook County Hospital, Chicago, and started out my medical career as a pediatrician.

I was with the United States Public Health Service for three years. I served during World War II for six years, and I have been with the Veterans Administration [fol. 5] in exclusive practice of psychiatry ever since.

Q. Are you the author of a report under date of December 1, 1961?

A. I am.

Q. On this case?

A. Yes, I am. There are several reports here. I don't know which one you are referring to.

Q. I will show you a copy of it. Apparently his Honor has it.

A. Yes.

Q. Is that the most recent report on Mr. Corey?

A. That's the most recent complete report, yes. There have been other notations since then.

Q. Can you tell us whether or not, in your opinion, Mr. Corey is in need of continued psychiatric care?

A. I feel that he has been in need of treatment for a long while and he still is in need of treatment, yes.

Q. Would you tell his Honor what kind of treatment and the frequency of it and where it would be available?

A. Well, this treatment is what is usually referred to as psychotherapy, the purpose of which would be for the individual to have made clear to him, through the process of the—the therapeutic process, why he behaves in the manner he does, why he does things that he does, why he feels things and behaves, in order to correct those which need correction.

Q. What kind of—

[fol. 6] A. This is a long drawn-out process which would probably require a minimum of one or two years for further treatment, at least.

Q. Is there any requirement, from your point of view, that he be hospitalized?

A. Not necessarily. Treatment is definitely indicated. Hospitalization, per se, is not.

Q. Where would such treatment as you think he would require be available?

A. There are two sources of treatment that are available to him. He is eligible to receive it through the Veterans Administration on an outpatient basis, and of course he is always eligible to seek it with a private psychiatrist.

Q. Has he been hospitalized in recent months?

A. He has been continuously hospitalized since the first day of December, 1961.

Q. Until—

The Court: Is he there now?

The Witness: He is still there a patient, yes, sir.

Q. Insofar as your professional opinion is concerned, what effect, if any, would a jail sentence have on the rehabilitation of the patient?

A. Well, I think it would be highly undesirable from the point of view of the doctor for two reasons: one is that it is a virtual certainty that if he is incarcerated any place treatment could not and would not take place and even if [fol. 7] it were available I think—again I speak from the point of view of a doctor, could serve no purpose whatsoever in my opinion to put him—to incarcerate him.

The Court: You say there is no place he could get this treatment if he were incarcerated? The United States has hospitals for such people.

The Witness: Yes. Except, sir, that hospitalization or incarceration for this treatment isn't necessary. I think he could get the treatment without necessarily being in a hospital.

The Court: I thought you indicated that the United States did not have the facilities to give him the treatment.

The Witness: Well, they don't have quite as many facilities as they have the reasons to use the facilities.

The Court: Are you sure of that?

The Witness: Pretty certain, sir.

Q. Would you think that hospitalization would cause any damage as far as rehabilitation is concerned?

A. It would be my medical opinion that it would, yes.

The Court: Why wouldn't it be just as much damaging in the Veterans Bureau?

The Witness: I propose to have him discharged from the Veterans Bureau virtually any day.

The Court: Is that for the reason hospitalization is hurting?

The Witness: Not in a positive sense, but in the same [fol. 8] sense a person had a minor injury or illness that needed treatment in a doctor's office once a week and were kept in a hospital, I think injures in a sense there is no pattern of normal living within the framework of a hospital. One isn't employed or does a lot of things he would

in the course of normal living. To that extent hospitalization is not needed.

Mr. St. Clair: That's all I have, if your Honor please.

The Court: I have not a full probation report in this case. I did talk to the probation officer who I now understand has talked with Mr. Corey this morning.

Now, I think, in the light of the circumstances—and consequently I have no advice or help from the District Attorney's office because of that fact, and I will do this: I will put the case over for two weeks. Mr. Griffin, I will ask you then to have a complete probation report. I will ask you, Mr. Penney, to transcribe the notes of the testimony of this doctor so that they may be furnished the District Attorney for further study, and then on April 9th, Mr. Clerk, we will dispose of the case at 12 o'clock.

Mr. St. Clair: If your Honor please, could I hand to the probation department my copy of the clinical report?

The Court: Yes, if you wish. We have a copy of that report, of course.

Mr. St. Clair: You may want to keep that.

The Court: That will remain in the papers until I get [fol. 9] further advice.

Mr. St. Clair: Why don't I hand this to Mr. Griffin for his use.

The Court: No harm in handing that to the probation officer at all. The case will stand until April 9 at 12 o'clock. Eleven o'clock would be better.

Mr. St. Clair: Eleven o'clock, April 9th. Thank you.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 10] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Crim. 61-67-F

FORD, D.J.

UNITED STATES OF AMERICA,

v.

BENJAMIN W. COREY.

Court Room No. Three
Federal Building, Boston

TRANSCRIPT OF SENTENCING PROCEEDINGS OF APRIL 9, 1962

The Clerk: Criminal 61-67-F. United States v. Benjamin W. Corey.

The Court: All ready.

Mr. O'Connor: May it please the Court, this case is in order for disposition. It is the recommendation of the United States Attorney that the defendant be committed to the custody of the Attorney General in accordance with the provisions of Section 4208 (b) of Title 18.

The Court: Are you familiar with this?

Mr. St. Clair: Yes, I have just read it, if your Honor please. Section 4208 (b) obviously is designed to insure at least some supervision by way of treatment for a period [fol. 10a] of time of I think no less than three months.

The Court: Yes.

Mr. St. Clair: As I remember the testimony of the doctor from the Veterans Hospital, he testified that the defendant had been at the hospital since the date of the jury's verdict, which was early in December, and that he was now at the point where he was able to be treated almost as an outpatient.

If this sentence were imposed it would mean in substance he would be enforcibly hospitalized again and I suspect

it would not have any beneficial effect by way of rehabilitation, at least according to the doctor who is in charge of the case at the Veterans Hospital.

It would seem to be far more appropriate he be given a suspended sentence conditioned upon his continuing treatment at the hospital, which could be properly supervised by the probation officer and regular reports could be received and then his current treatment would not be so drastically interrupted and the period of time he has already spent in the hospital, which has been nearly four months, would not necessarily be jeopardized or lost.

It seems to be a far more appropriate sentence under these conditions. Therefore I respectfully request that your Honor suspend any sentence and condition that upon continuing treatment at the Veterans Hospital in the manner [fol. 10b] satisfactory to the probation officer.

The Court: Have you anything to say, Mr. Corey, about the disposition of this matter this afternoon?

The Defendant: My attorney will speak for me, sir.

The Court: You do not care to add anything?

The Defendant: I am not aware of what I could.

The Court: Well, I have done something in the interim with respect to facilities for psychiatric and psychological treatment in our institutions and I have a communication here from our Director of the Bureau of Prisons, Mr. Bennett.

It was my intention when the case came on before to impose a jail sentence. But on hearing evidence adduced by counsel, I decided then, not having a complete probation report, to pause and make some investigation on my own account.

Of course I was familiar then and am familiar now with 4208 (b) and they have adequate facilities to determine these matters. I think it may be a good idea, a progressive idea, for the Court to know something more about the defendant than I have seen or heard up to date. Mr. Clerk.

[The Court confers with the Clerk.]

The Clerk: Benjamin W. Corey, hearken to your sentence as the Court has awarded it against you. The Court orders that you be committed to the custody of the Attorney General of the United States under Title 18,

United States Code, 4208 (b). Mr. Marshal, the prisoner is now in your custody under sentence of this Court.
[fol. 10c] The Court: Just one more remark. In considering the type of sentence, the sentence I would have imposed in this case, I was convinced in my opinion, without the slightest doubt, that a perjured defense was offered in the defense of this defendant.

Next case, Mr. Clerk.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 11]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6046

BENJAMIN W. COREY, Defendant-Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

NOTICE OF APPEAL—Filed July 20, 1962

Name and address of appellant:

Benjamin W. Corey, 6 Winter Street, Cochituate, Massachusetts.

Name and address of appellant's attorneys:

Kargman and Kargman, 11 Pemberton Square, Boston, Massachusetts.
[fol. 12] Russell Morton Brown, Brown, Goodpasture, & Block, Federal Bar Building, 1815 H St., N. W., Washington 6, D. C.

Offense: False claims against the Government, Title 18 U. S. Code Section 287.

Concise statement: Defendant was found guilty by jury of 75 counts and committed on April 9, 1962, to

the custody of the Attorney General under Title 18 U. S. Code Section 4208(b).

On July 16, 1962, following report from the Bureau of Prisons, defendant was placed on probation for two years, and released from custody.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the First Circuit from the above judgment of July 16, 1962.

Benjamin W. Corey, Appellant, by Russell Morton Brown, Counsel.

July 19, 1962

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

..... DIVISION

No. 61-67-F

UNITED STATES OF AMERICA,

v.

BENJAMIN W. COREY.

STATEMENT OF DOCKET ENTRIES

1.	Indictment for making false claims, knowing same to be false, fictitious and fraudulent in violation of Title 18, section 287	
	Filed	March 13, 1961
[fol. 13]		
2.	Arraignment	April 4, 1961
3.	Plea to indictment or information Not guilty	April 4, 1961

4. xxxxxxxx xxxxxxxxxxx

5. Trial by jury, Nov. 14, 17, 28, 29, 30, Dec. 1, 1961

6. Verdict of guilty December 1, 1961

7. Order—imposition of sentence suspended and deft. placed on probation for two years

Entered July 17, 1962

8. Notice of appeal filed July 19, 1962

Dated July 19, 1962

Attest Mary K. Shamber, Clerk.

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE TYPEWRITTEN MOTION FOR DISMISSAL UNDER RULE 26—Filed August 10, 1962

Now comes the United States of America, appellee, and moves this Honorable Court that it be granted leave to file a typewritten motion for dismissal in the matter of the appeal of the defendant-appellant, Benjamin W. Corey, from the Order on Probation entered by the United States District Court for the District of Massachusetts on July 17, 1962.

W. Arthur Garrity, Jr., United States Attorney,
By: Thomas P. O'Connor;
Thomas P. O'Connor, Assistant U. S. Attorney;
Attorneys for Appellee.

[fol. 14]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

ORDER GRANTING LEAVE TO FILE—August 10, 1962

Upon motion, Leave is granted to appellee to file in typewritten form under Rule 20 of the Rules of this Court a motion to dismiss appeal (to be treated as a motion to docket and to dismiss appeal) and memorandum in support thereof; and further

Leave is granted to appellant to file in similar form any memorandum in opposition thereto by August 24, 1962.

By the Court:

Roger A. Stinchfield, Clerk.

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

MOTION TO DISMISS APPEAL—Filed August 10, 1962

On April 9, 1962, a judgment of conviction was entered against the defendant-appellant, by the United States District Court for the District of Massachusetts, pursuant to which the defendant-appellant was placed in the custody of the Attorney General and committed by him to the United States Penitentiary at Lewisburg, Pennsylvania. Thereafter, on July 17, 1962, pursuant to the terms and conditions of said judgment of conviction and the statute on which said judgment was based (Title 18, U.S.C. Sec. 4208), the District Court entered an Order on Probation. On July 19, 1962, the defendant-appellant, while on probation pursuant to said order, filed a Notice of Appeal to this Court from the said Order on Probation. The original file of the United States District Court is presently in custody of the Clerk of this Court. Attached hereto and made a part hereof are (a) copy of judgment of the United States District Court for the District of Massachusetts entered on April 9, 1962, and (b) copy of the Order on

Probation entered by the United States District Court [fol. 15] for the District of Massachusetts on July 17, 1962.

The appellee, United States of America, moves that this appeal be dismissed, and for reasons therefor states:

(a) The judgment of conviction sentenced the defendant-appellant to a maximum penalty of 375 years imprisonment and/or fines in the total amount of $750,000.

(b) The defendant-appellant is not aggrieved by the Order on Probation entered July 17, 1962.

W. Arthur Garrity, Jr., United States Attorney,
By: Thomas P. O'Connor;
Thomas P. O'Connor, Assistant U. S. Attorney;
Attorneys for Appellee.

ATTACHMENT TO MOTION

ORDER ON PROBATION

FORD, D.J.

The above-named defendant having been committed to the custody of the Attorney General of the United States or his authorized representative under the provisions of Title 18, U.S.C., section 4208(b), on April 9, 1962, and the report of Classification Study having been submitted to the Court and after oral arguments by counsel and due considerations by the Court; it is

[fol. 16] ORDERED that imposition of sentence be suspended and the defendant, Benjamin W. Corey, be placed on probation for a term of two (2) years.

/s/ AUSTIN W. JONES, JR.,
Deputy Clerk
Order entered July 17, 1962
John A. Canavan, Clerk
by /s/ GRACE V. FLOOD,
Deputy Clerk

/s/ FRANCIS J. W. FORD
U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
No. 61-67-F Criminal

UNITED STATES OF AMERICA,

v.

BENJAMIN W. COREY.

ATTACHMENT TO MOTION

On this 9th day of April, 1962, 19 came the attorney for the government and the defendant appeared in person and by counsel,

It is adjudged that the defendant has been convicted upon his plea of not guilty, and a Verdict of Guilty by Jury of the offense of Violation of Title 18, Section 287, USC, made and presented for payment to a department of the United States, the Department of the Army, claims upon and against the Department of the Army, U.S. Government Standard forms 44a purportedly ordering merchandise, indicating receipt of said merchandise and claiming payment therefor, knowing such claims to be false, fictitious and fraudulent, in that the said merchandise was never actually ordered and received by the Department of the Army.

as charged in counts 1 to 75 inc. on the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is ADJUDGED that the defendant is guilty as charged and convicted.

[fol. 17] IT IS ADJUDGED that the defendant is hereby committed to the custody of the attorney General or his authorized representative under the provisions of Title 18, U.S.C. Section 4208(b)

IT IS ADJUDGED THAT

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ FRANCIS J.W. FORD
united states district judge

The Court recommends commitment to:

.....,

Clerk.

[fol. 18]

IN UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BENJAMIN W. COREY, Defendant-Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

MEMORANDUM OPPOSING MOTION TO DISMISS—
August 22, 1962

The facts recited in the U. S. Attorney's Motion to Dismiss the Appeal are substantially correct. However, it must be noted that the so-called judgment of conviction dated April 9, 1962, was based on Title 18, U. S. Code, section 4208(b). That statute authorizes commitment to the custody of the Attorney General for an unspecified period, pending a report and recommendations from the Bureau of Prisons within 90 days. This is utilized "If the court desires more detailed information as a basis for determining the sentence to be imposed." [18 U.S.C. sec. 4208(b)] (Underscoring supplied) During this period of study by the Bureau of Prisons the defendant is to be deemed under the maximum sentence, in this case 375 years imprisonment *and* $750,000 fine.

The statute further provides that after receiving the reports and recommendations, the court may (1) place the prisoner on probation, (2) affirm the original sentence of imprisonment, or (3) reduce the sentence and commit the offender under any applicable provision of law.

In the case at bar, the court received and considered the report of the Bureau of Prisons and on July 17, 1962, placed the defendant-appellant on probation. The U. S. Attorney's position is that the entry of April 9, 1962, under [fol. 19] section 4208(b) was a final appealable judgment and the appeal has been lost by failure to give Notice of Appeal within 10 days thereof. The only question here is whether or not the order of April 9 or the order of July 17 was the appealable final judgment which disposed of the case. It will be noted that the order of April 9 specified no term of imprisonment at all. Therein lies the critical distinction between this case and the *Behrens Case*, 190 F. Supp. 799 (D. Ind., 1961), relied upon by the U. S. Attorney. The Indiana court had sentenced the defendant to 20 years imprisonment, but reserved the power to modify if the Bureau of Prisons should so recommend. Accordingly it held there was no right of appeal after the 10 days for giving notice thereof had elapsed. The original sentence simply remained in effect, unless the court should see fit to modify it.

Nothing of the kind happened in the case at bar. No sentence whatever was pronounced. No punishment was imposed, simply a commitment to the Attorney General. The court below was under affirmative statutory obligation to take further action: (1) to suspend and place on probation, (2) to affirm the original sentence, or (3) to reduce the term and re-sentence. It is absurd to claim that the court intended its sentence to be 375 years imprisonment and $750,000 fine. That is clearly shown by the probationary release of defendant on July 17 after the court had been fully advised. This is not different from the old procedure of requesting a *pre-sentence report*, and continuing the defendant at liberty under bond.

So long as the court holds open any inquiry of fact or law, the judgment is not final and cannot be appealed. *Beebe* v. *Russell*, 60 U.S. (19 How.) 283, 285 (1857). Ob-

viously, "tentative decisions" of trial courts are not appeal-
[fol. 20] able. *United States* v. *Smith*, 331 U.S. 469 (1947). The test for criminal as well as civil cases is whether the decision terminates the litigation on the merits, leaving nothing to be done but enforcement of the decree. *Berman* v. *United States*, 302 U.S. 211 (1937).

Nothing could be clearer than the court's desire for information and recommendations from the Bureau of Prisons before imposing sentence, and this is confirmed by the probationary order which was based on the report.

The legislative history of Title 18 U.S. Code, sec. 4208(b), (the Federal Sentencing Act) is found in U.S. Code Cong. & Adm. News, 85th Cong., 2d Sess., 1958, pp. 3891 et seq. It shows beyond question that the purpose was to bring uniformity to sentencing procedures in the federal courts, and to this end the report and recommendations of the Federal Bureau of Prisons were to be available for the court's information and guidance.

That the order of July 17 was the final sentence is shown beyond dispute by Senate Report No. 2013, July 29, 1958 (to accompany H. J. Res. 424):

> "This section [now 4208(b)] would permit the court, in particularly complex cases, to commit the defendant to the Attorney General for a 3- to 6-month study. After the court had received a summary of the Attorney General's findings, it could impose a final sentence under any applicable statute." (Underscoring supplied) [U.S. Code Cong. & Adm. News, *supra*, at p. 3891. Identical language is used in the Conference Report. Id. at p. 3905].

The Congress fully recognized that only *after* the court has received the Attorney General's findings would *final sentence* be imposed. The same reasoning was followed by the Administrative Office of United States Courts, Washington, D. C., in commenting on the legislation [Id. at p. 3897]. By letter of July 21, 1958 it refers to the first [fol. 21] commitment as a "tentative sentence", and says:

"The Judicial Conference feels that the sentencing judge before imposing final sentence should be able to receive, if he deems advisable, a more complete study of the defendant. * * *" (Underscoring supplied)

Since the jurisdiction of this court extends only to final decisions (28 U.S. Code, sec. 1291, 62 Stat. 929, June 25, 1948), the order of July 17, made *after* the court had received the Attorney General's report, is the only one subject to appeal.

This is clearly in accord with sound administration of justice: conceivably the final action might be such as to make appeal undesirable or unnecessary, as where the court might impose a nominal fine or suspend sentence entirely. Why further congest the appellate docket with appeals from tentative sentences?

In the case at bar, the defendant-appellant staunchly asserts his innocence, and feels that serious errors of law denied him a fair trial. Even though the trial court has graciously released him on probation, he seeks to reverse the conviction and clear his name. It is unthinkable that he be denied this opportunity for appellate review on an unwarranted super-technical construction of the sentencing statute.

It is respectfully urged that the Motion to Dismiss the Appeal be denied, and suggest that the Court consider the desirability of oral argument to develop fully the important legal question here involved.

Russell Morton Brown, Attorney for Defendant-Appellant.

August 22, 1962

[fol. 22] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 23] Thereafter, on August 24, 1962, this cause was submitted to Honorable Peter Woodbury, Chief Judge, and Honorable John P. Hartigan, Circuit Judge.

[fol. 24]

IN UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6046

BENJAMIN W. COREY, Defendant-Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

On Motion to Dismiss Appeal

Before Woodbury, Chief Judge, and Hartigan, Circuit Judge.

Russell Morton Brown for appellant on memorandum.

W. Arthur Garrity, Jr., United States Attorney, and Thomas P. O'Connor, Assistant U. S. Attorney for appellee on motion to dismiss and memorandum.

OPINION OF THE COURT—September 18, 1962

PER CURIAM. This is a motion by the United States to dismiss, as untimely, defendant-appellant's appeal from a judgment of conviction entered by the United States District Court for the District of Massachusetts.

Defendant was convicted as charged in the indictment of seventy-five offenses of making and presenting for payment to a department of the United States—the Department of the Army—false, fictitious and fraudulent claims in violation of 18 U.S.C. § 287. The maximum penalty for each offense is five years imprisonment or a fine of $10,000 or both.

On April 9, 1962, the district court entered a judgment of conviction against the defendant expressly noting that the judgment was entered pursuant to 18 U.S.C. § 4208(b). [fol. 25] This statute empowers a court for a maximum period of six months to modify a defendant's sentence without being restricted to sixty days, as provided by Rule 35, Fed-

eral Rules of Criminal Procedure. Following the April 9 judgment, defendant was placed in the custody of the Attorney General and committed by him to the United States Penitentiary at Lewisburg, Pennsylvania.

Thereafter, on July 17, 1962, again pursuant to 18 U.S.C. § 4208(b), the district court entered an Order On Probation, suspending sentence and placing the defendant on probation for a term of two years.

Defendant took no appeal from the April 9 judgment but has appealed the Order On Probation entered July 17, 1962. The United States Attorney's position is that the judgment of April 9, 1962, under § 4208(b), was a final appealable judgment and that defendant's right of appeal has been lost by failure to give notice of appeal within ten days thereof.

The defendant contends that under the April 9 judgment "No sentence whatever was pronounced. No punishment was imposed, ..." However, the district court expressly noted that it was acting under the provisions of Title 18, U.S.C. § 4208(b). Under this section the statute clearly states that the term of "commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law." Consequently, at this point the defendant was on notice as to the extent of his punishment. If he desired to appeal, this was the time that he should have acted. While it is true that defendant could reasonably assume that the judge would modify this maximum sentence, the judge was assuredly under no duty to do so. See *United States* v. *Behrens*, 190 F. Supp. 799 (D.C.S.D., Ind. 1961).

An order will be entered docketing the case and granting the motion to dismiss defendant's appeal.

[fol. 26]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

JUDGMENT—September 18, 1962

Upon consideration of motion to dismiss appeal, memoranda in support thereof and in opposition thereto.

It is ordered that the appeal be, and the same hereby is, dismissed.

By the Court:

Roger A. Stinchfield, Clerk. By: Dana H. Gallup, Chief Deputy Clerk.

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

PETITION FOR REHEARING—Filed October 2, 1962

The Court is respectfully prayed to revise its decision of September 18 ordering the appeal dismissed as being too late. The following grounds are urged:

(1) The District Court need not have reduced the sentence, but it was under affirmative obligation to do *something*:

(a) It had a statutory obligation to receive and consider the report and recommendations of the Bureau of Prisons; and

(b) It had a statutory obligation to pronounce some kind of "final sentence", either affirming the maximum penalty, or reducing or suspending that penalty, or sentencing under any applicable statute.

It must be remembered that the lower Court had simply ordered the Defendant into the custody of the Attorney General "as a basis for determining the sentence to be [fol. 27] imposed". [18 U.S.C. sec. 4208(b)] In the *Behrens Case*, the sentence was 20 years imprisonment: that disposed of the matter completely.

Not so in the case at bar. The Court wanted the views of the Bureau of Prisons before imposing sentence. True it is that by law the Defendant was to be deemed as under maximum sentence, but that was not to be the end. The Bureau of Prisons Report and Recommendation had to be received and considered. Only then could the sentencing act be fully carried out by one of the alternatives specified in the Act. And one of them had to be employed by the lower Court—even if it were to affirm the earlier "tentative" sentence imposed.

It seems clear that the legislative history of the sentencing Act [Title 18 U.S.C. sec. 4208(b)] previously set forth in Defendant-Appellant's Memorandum, must be accorded some weight in interpretation. Clearly it was never intended that the right to appeal be prejudiced or varied without notice; and no such effect was considered possible in view of the terminology in Congressional reports: "Tentative sentence" of commitment to the Attorney General; and

> After the Court had received a summary of the Attorney General's findings, it could impose a *final sentence* under any applicable statute. (Senate Report No. 2013, July 29, 1958).

The Judicial Conference likewise showed that this is the only possible interpretation. It likewise said the study by the Bureau of Prisons should be in the hands of the sentencing judge "before imposing final sentence".

It is respectfully prayed that the Court give the obvious weight to clear language, and recognize the finality of the sentence pronounced on July 9, 1962.

This would cause no disruption in the administration of justice, but simply preserve to this litigant an opportunity for judicial review of his trial—a valuable statutory right which should not lightly be disregarded.

[fol. 28] (2) The *Behrens Case*, 190 F. Supp. 799 (D. Ind., 1961) is not in point and is no precedent for this case; it involved a definite final sentence from which appeal was sought after the ten days provided by law. No second sentencing ever took place, as in the case at bar.

It is respectfully prayed that the Court revise the decision of September 18 ordering this appeal dismissed, and deny the Government's motion to this effect.

Undersigned counsel hereby certifies that this petition for rehearing is presented in good faith and not for the purpose of delay.

Russell Morton Brown, Attorney for Defendant-Appellant.

Brown, Goodpasture & Block, Attorneys and Counsellors at Law, Federal Bar Building, 1815 H. Street, N. W., Washington 6, D. C.

Kargman & Kargman, Attorneys and Counsellors, 11 Pemberton Square, Boston, Massachusetts.

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

ORDER DENYING PETITION FOR REHEARING—October 3, 1962

It is ordered that the petition for rehearing filed by appellant be, and the same hereby is, denied.

By the Court:

Roger A. Stinchfield, Clerk.

[fol. 29]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

MOTION TO STAY MANDATE—Filed October 3, 1962

Comes now Defendant-Appellant, having petitioned the Court for a Rehearing on its Order Dismissing the Appeal, and being desirous of seeking review, if necessary, by the Supreme Court of the United States, and respectfully moves this Court to stay the issuance of mandate until a petition for certiorari can be filed in the Supreme Court.

Russell Morton Brown

October 1, 1962

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

ORDER STAYING MANDATE—October 3, 1962

Upon motion of appellant to stay mandate herein pending an application to the Supreme Court of the United States for a writ of certiorari, the same to be filed by the date prescribed by law, and notice of such filing to be filed promptly with the Clerk of this Court,

It is ordered that said mandate be, and the same hereby is, stayed.

By the Court:

Roger A. Stinchfield, Clerk.

[fol. 30] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 31]

SUPREME COURT OF THE UNITED STATES

No. 569—October Term, 1962

BENJAMIN W. COREY, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—January 21, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.